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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOHNNY ROBERT FOSTER, Defendant and Appellant.	B180513 (Los Angeles County Super. Ct. No. NA 052 018)

APPEAL from the judgment of the Superior Court of Los Angeles County. Mark C. Kim, Judge. Affirmed in part, reversed in part and remanded.

Colleen M. Rohan, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Kyle S. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Johnny Robert Foster appeals from the judgment following his convictions for gang-related murder, attempted murders, and robberies. Because of the trial court's prejudicial admission of evidence of Foster's robberies of two markets 11 years earlier in Long Beach, we reverse and remand for retrial.

FACTS AND PROCEDURAL HISTORY

At 11:30 p.m. on February 1, 2002, Jared Ball, Nichlaus Omar Martin, Edward Bender, and Rashard McClaren were waiting at a Long Beach bus stop. Appellant Johnny Foster, who belonged to the Insane Crips gang, approached the four young men. He pulled out a gun and asked the four of them to name their gang. Although Ball belonged to a rival gang, the West Coast Crips, they answered they were not gang members.

Appellant ordered the four men to lift up their shirts and empty their pockets. He then told them to lie down on top of each other. He patted their pockets, repeating his earlier question about their gang membership. Continuing to search them, he found a blue bandana on Ball. Blue is the Crips's gang color, and one way a gang member might show his membership is by carrying a gang-colored bandana. Accusing the four young men of lying to him, appellant began firing his gun. He shot nine rounds, hitting Ball five times and killing him. He also hit two of the others, but they and the third young man managed to get up and escape.

The People filed an information charging appellant with the murder of Jared Ball and attempted murder of the other three. The information also charged him with robbing all four men. Appellant pleaded not guilty. He was tried by jury. After two days of deliberations, the jury reported it was having trouble reaching a verdict. On its third day of deliberating, the jury announced it was hopelessly deadlocked, seven voting to convict and five to acquit. The court declared a mistrial and set the matter for retrial.

Appellant's retrial began in November 2004. His second trial differed from his first in at least two important respects. First, the court permitted the People to introduce testimony of two shopkeepers appellant had robbed 11 years earlier in 1993. Second,

appellant was also tried for possession of a jailhouse shank. On the second day of deliberations, the jury convicted appellant of all charges of murder, attempted murder, robbery, and possession of a shank. The court sentenced appellant to life in prison without possibility of parole, plus a consecutive term of 210 years to life. This appeal followed.

DISCUSSION

1. *Prejudicial Admission of Market Robberies*

In 1993, appellant was convicted of robbing two Asian markets in Long Beach. In appellant's first trial here which ended in a mistrial because the jury deadlocked, the People did not offer any evidence from the market robberies. By contrast, the People's very first two witnesses in appellant's retrial were those robbery victims.

The victim of the first robbery, Huang Bun, testified appellant and an accomplice came into her store about 9:00 o'clock one morning in September 1993. They demanded a customer in the store get down on all fours, and ordered Bun to open the register. After removing money from the register and taking Bun's wallet, they told her to lie down and they left the store.

Around 4:00 o'clock in the afternoon that same day, appellant and an accomplice robbed a second market. The victim, Tai Hung Chiem, testified one of the two robbers stood guard at the door, while the second robber demanded Chiem open the cash register. After taking cash from the register, the robber told Chiem to lie down on the ground and the robbers left.

The trial court instructed the jury to consider the evidence of appellant's robberies of the markets only to show a characteristic method, plan, or scheme. The court told the jury:

> "[The robbery evidence] may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of

> determining if it tends to show a characteristic method, plan, or scheme in the commission of criminal acts similar to the method, plan, or scheme used in the commission of the offense in this case which would further tend to show a clear connection between the other offense and the one which the defendant is accused so that it may be inferred that if defendant committed the other offenses, defendant also committed the crimes charged in this case."

Appellant contends the court erred in admitting evidence of the two market robberies because it was inadmissible evidence of prior bad acts. We agree.

We review admission of evidence for abuse of discretion. (*People v. Gray* (2005) 37 Cal.4th 168, 202.) The People assert the court properly admitted evidence of the market robberies to show a common method, plan, or scheme. According to the People, the market robberies were connected to the robberies at issue here because in each case the crimes took place in Long Beach and the robbers wore dark clothing, were armed with guns, and forced their victims to lie down.

The similarities the People describe between the market robberies and appellant's robbery of his four victims here do not satisfy the exception for admission of prior bad acts to show a common method, plan, or scheme. The exception applies to link events which are part of a single overarching crime or series of connected crimes. It is not enough that the crimes share some similarities in their execution. As the Supreme Court explained in *People v. Ewoldt* (1994) 7 Cal.4th 380, "To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts . . . ." (*Id.* at p. 403.) *Ewoldt* teaches that "in establishing a common design or plan, evidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' " (*Id.*, at p. 402; see also 1 Witkin, Cal. Evidence (4th ed. 2000) Circumstantial Evidence, § 87, pp. 426-427.)

One cannot plausibly link as "individual manifestations" of a "general plan" appellant's two market robberies in 1993 – for which he served seven years in prison –

with the robberies and murder at issue here a decade later. The 1993 robberies were daytime holdups of Asian markets; the crimes here were near-midnight attacks at a bus stop on the street. The market robberies involved two robbers; one man committed the robbery murder here. No shots were fired and no one was hurt in the market robberies; one victim was murdered and two victims were seriously wounded at the bus stop. The record contains no evidence of a gang connection to the market robberies; the robbery murder here was replete with gang evidence.

Respondent cites decisions purporting to find that forcing victims to lie down is sufficiently distinctive to permit a jury to hear evidence of a defendant's uncharged prior bad acts where the victims were ordered to the floor. Respondent's decisions are inapt because all involved more similarities between the charged offense and prior bad act than forcing victims to the ground. For example, in *People v. Osband* (1996) 13 Cal.4th 622 (*Osband*), each of the defendant's separate victims was an elderly woman whom the defendant severely beat and choked, cut or stabbed in the neck, raped or intended to rape after tearing or pulling aside her panties, and, after emptying her purse, took her money or wallet; in addition, while committing his vicious attacks, he also forced his victims to lie down. (*Id.* at p. 683.) And in the second case respondent cites, *People v. Nguyen* (1993) 21 Cal.App.4th 518 (*Nguyen*), a group of eight or nine young men committed take-over robberies of tanning salons in Sacramento by forcing their way into the business, ordering the proprietor and customers to lie down, binding them with tape, covering their heads, stealing their money and jewelry, and sexually assaulting at least one of the women inside the store. (*Id.* at p. 526.) Appellant's crimes at the bus stop show no level of similarity to the market robberies coming even close to the offenses in *Osband* and *Nguyen*. (See 1 Witkin, Cal. Evidence (4th ed. 2000) Circumstantial Evidence, § 94 [forcing victim to lie down is not, by itself, distinctive].)

Respondent argues in the alternative that the market robberies were "relevant to establish [appellant's] intent in forcing his victims to the ground." We reject this alternative basis because it misapprehends the meaning of intent for admitting evidence of prior bad acts. Such intent is the mental state and awareness needed to commit the

crime, as opposed to having performed the illegal act by mistake, accident, or inadvertence. (*People v. Robbins* (1988) 45 Cal.3d 867, 879-880, overruled on another point in *People v. Jennings* (1991) 53 Cal.3d 334, 387 fn. 13 [evidence of uncharged crimes admissible to prove intent where defendant argues that even if he committed the act, he lacked criminal intent].) No one, including appellant, disputes that the perpetrator of the robbery murder intentionally robbed and shot his victims, nor does anyone dispute that the perpetrator intentionally ordered his victims to lie down. Appellant did not argue that what happened at the bus stop was not a crime, or occurred by accident; he argued he was not the robber and killer. His defense here was not inadvertence or any related concept; it was misidentification. Thus, the perpetrator's intent – whether it was appellant or someone else – was irrelevant because it was never disputed, making it error to admit evidence of past crimes to prove intent.

The court's error in admitting evidence of the market robberies was not harmless. The People's case against appellant rested on the eyewitness testimony of the three surviving bus stop robbery victims, two of whom identified appellant in photo lineups and at trial as the murderer, while the third described their assailant as having a rough complexion that matched the condition of appellant's skin when the police arrested him one week after the murder. On the other hand, no physical evidence linked appellant to the bus stop robberies and murder, and DNA evidence found at the murder scene was not his. In addition, when police arrested appellant at home, they found no evidence tying him to the crime.

Appellant's first trial, in which the People did not offer evidence of the market robberies, ended in a mistrial because the jury could not reach a verdict. Significantly, no solitary holdout prevented a verdict; to the contrary, five jurors voted to acquit appellant. For appellant's retrial, the People's lead-off witnesses were the victims of the market robberies. Before these witnesses took the stand, the court instructed the jurors that if they found appellant committed the market robberies – and the jury could not reasonably find otherwise because the prosecution and defense stipulated appellant had been convicted of those robberies – the jurors could infer appellant committed the bus stop

robberies and murder. On this record, we find it more than likely that the different outcomes of appellant's two trials turned, at least in part, on the court's erroneous admission of the market robberies.

Respondent contends the court's admission of the market robberies did not prejudice appellant because, as defense counsel reluctantly conceded at trial, the jury would have probably learned about the robberies eventually as impeachment evidence if appellant testified in his defense. The trial court correctly rejected that contention because it involved speculation about whether appellant would testify. Moreover, respondent's contention ignores that appellant's decision whether to testify likely rested partly on whether the jury had already learned about his prior convictions. And, indeed, the way the two trials unfolded bears that out: Appellant did not testify in his first trial where the jury never learned about the market robberies, but did testify in his retrial after the jury had heard about them.

2. *Consolidation of Shank Charge*

During both trials, appellant was in custody in county jail. Three months before his first trial began, deputies searching his cell found appellant and his three cellmates each had his own jailhouse shank among his belongings. Five months after the first trial ended in a mistrial but before appellant's retrial, the People filed a new information charging appellant with possession of the shank. The People moved to consolidate the trial of the shank charge with the retrial of the murder and robbery charges, which the court granted. Appellant contends the court erred. Reviewing the consolidation order for abuse of discretion, we find no error. (*People v. Ochoa* (1998) 19 Cal.4th 353, 408.)

Penal Code section 954 permits the People under certain circumstances to prosecute in one trial separate crimes committed at different times against different victims. One such circumstance arises when the separate crimes involve the same class of offense. (Pen. Code, § 954.) Appellant contends simple possession of a jailhouse shank is not the same class of offense as murder and robbery because it does not involve assaultive behavior against a person. (Cf. *People v. Balderas* (1985) 41 Cal.3d 144, 169

[kidnapping, robbery, murder and sex crimes are same class of offense involving "assaultive behavior against the person"].) His contention is unpersuasive. The very purpose of the ban on weapons by inmates is to ensure inmates do not use such weapons to injure or kill other inmates or guards. (*People v. Velasquez* (1984) 158 Cal.App.3d 418, 420.) Thus, an inmate's possession of a shank implies, at a minimum, the threat of violence against others. (*People v. Hughes* (2002) 27 Cal.4th 287, 383; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 589; see also *People v. Thomas* (1990) 219 Cal.App.3d 134, 140 [ex-felon in possession of firearm of same class of offenses involving "assaultive crimes against the person" as attempted murder and robbery].) Accordingly, the trial court did not abuse its discretion in consolidating the trial on the shank offense with the murder and robbery charges.

Appellant also contends that even if the law permits consolidation in a particular case, a trial court nevertheless errs if the prejudice from consolidation outweighs the People's interest in the judicial efficiency of a joint trial. Here, however, there was no prejudice because appellant's possession of the shank was admissible to show his motive for murdering Jared Ball. (*People v. Arias* (1996) 13 Cal.4th 92, 126-127 ["Joinder is generally proper when the offenses would be cross-admissible in separate trials, since an inference of prejudice is thus dispelled"]; see also 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000 & 2006 supp.) Trial, § 396.) The prosecution's theory was appellant killed Ball because Ball belonged to a rival gang. The prosecution offered expert testimony gang members arm themselves with jailhouse shanks in order to further gang activities. Appellant asserts the prosecutor had plenty of other evidence to show his gang connection and motive without resorting to the shank evidence. His argument is unavailing, however, because appellant disputed a gang motive by testifying he had quit his gang almost 10 years before Ball's murder. Appellant's denial of gang membership thus made the shank evidence, which tended to show ongoing membership, probative and admissible.

DISPOSITION

The judgment is reversed and the matter is remanded for retrial on the murder, attempted murder, and robbery charges only. Appellant's conviction for possession of a jailhouse shank is affirmed.

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RUBIN, ACTING P. J.

We concur:

BOLAND, J.

FLIER, J.